

FILED

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RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC HENRY SALDIVAR,

Plaintiff,

vs.

MICHAEL SAYRE MD, et. al.,

Defendants.

No. C 10-03809 JW (PR)

ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE DISPOSITIVE
MOTION OR NOTICE REGARDING
SUCH MOTION; INSTRUCTIONS TO
CLERK

Plaintiff, a prisoner at Pelican Bay State Prison ("PBSP") in Crescent City, California, filed a pro se civil rights complaint under 42 U.S.C. § 1983, challenging the conditions of his confinement. Plaintiff's motion for leave to proceed in forma pauperis will be granted in a separate order. In this order, the Court will conduct its initial review of the complaint pursuant to 28 U.S.C. § 1915A.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners

1 seek redress from a governmental entity or officer or employee of a governmental entity.
 2 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and
 3 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief
 4 may be granted, or seek monetary relief from a defendant who is immune from such
 5 relief. Id. at 1915A(b)(1), (2).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person
 7 acting under the color of state law committed a violation of a right secured by the
 8 Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988).
 9 Pleadings filed by pro se litigants, however, must be liberally construed. Hebbe v. Pliler,
 10 627 F.3d 338, 342 (9th Cir. 2010); Balistreri v. Pacifica Police Dep't., 901 F.2d 696, 699
 11 (9th Cir. 1990).

12 13 B. Plaintiff's Claim

14 Plaintiff claims that PBSP defendants Michael Sayre, Chief Medical Officer, Sue
 15 Risenhoover, MD, Phillip Grimm, Radiologist, Helmuth Vollger, Radiologist/Radiology
 16 Technician, Jim Flowers, RN, Chris McAllister, LVN, N. Adam, MD, and Maureen
 17 McLean, FNP, were deliberately indifferent to Plaintiff's serious medical needs in
 18 violation of the Eighth Amendment. Liberally construed, plaintiff's claim against these
 19 defendants appears cognizable under 42 U.S.C. § 1983. All other named defendants, i.e.,
 20 defendant "PCP Clinic" and all "Doe Defendants" are DISMISSED.

21 22 CONCLUSION

23 For the foregoing reasons, the Court orders as follows:

- 24 1. The clerk of the Court shall issue summons and the United States
 25 Marshal shall serve, without prepayment of fees, a copy of the complaint, all attachments
 26 thereto, and a copy of this order upon defendants **Michael Sayre, Chief Medical**
 27 **Officer, Sue Risenhoover, MD, Phillip Grimm, Radiologist, Helmuth Vollger,**
 28 **Radiologist/Radiology Technician, Jim Flowers, RN, Chris McAllister, LVN, N.**

1 Adam, MD, and Maureen McLean, FNP, at Pelican Bay State Prison, (P.O. Box
2 7000, Crescent City, CA 95531-7000). All other named defendants, i.e., defendant
3 “PCP Clinic” and all “Doe Defendants” are DISMISSED.

4 2. No later than **ninety (90) days** from the date of this order, defendants shall
5 file a motion for summary judgment or other dispositive motion with respect to the claims
6 in the complaint found to be cognizable above.

7 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
8 failed to exhaust his available administrative remedies as required by 42 U.S.C.
9 § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
10 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
11 Terhune, 540 U.S. 810 (2003).

12 b. Any motion for summary judgment shall be supported by adequate
13 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
14 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**
15 **nor qualified immunity found, if material facts are in dispute. If any defendant is of**
16 **the opinion that this case cannot be resolved by summary judgment, he shall so**
17 **inform the Court prior to the date the summary judgment motion is due.**

18 3. Plaintiff’s opposition to the dispositive motion shall be filed with the Court
19 and served on defendants no later than **thirty (30) days** from the date defendants’ motion
20 is filed.

21 a. In the event the defendants file an unenumerated motion to dismiss
22 under Rule 12(b), plaintiff is hereby cautioned as follows:¹

23 The defendants have made a motion to dismiss pursuant to Rule
24 12(b) of the Federal Rules of Civil Procedure, on the ground you
25 have not exhausted your administrative remedies. The motion will,
if granted, result in the dismissal of your case. When a party you are
suing makes a motion to dismiss for failure to exhaust, and that

26
27 ¹ The following notice is adapted from the summary judgment notice to be given to
28 pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en
banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 motion is properly supported by declarations (or other sworn
 2 testimony) and/or documents, you may not simply rely on what your
 3 complaint says. Instead, you must set out specific facts in
 4 declarations, depositions, answers to interrogatories, or documents,
 5 that contradict the facts shown in the defendant's declarations and
 6 documents and show that you have in fact exhausted your claims. If
 7 you do not submit your own evidence in opposition, the motion to
 8 dismiss, if appropriate, may be granted and the case dismissed.

9 b. In the event defendants file a motion for summary judgment,
 10 the Ninth Circuit has held that the following notice should be given to plaintiffs:

11 The defendants have made a motion for summary judgment by
 12 which they seek to have your case dismissed. A motion for summary
 13 judgment under Rule 56 of the Federal Rules of Civil Procedure will,
 14 if granted, end your case.

15 Rule 56 tells you what you must do in order to oppose a motion for
 16 summary judgment. Generally, summary judgment must be granted
 17 when there is no genuine issue of material fact – that is, if there is no
 18 real dispute about any fact that would affect the result of your case,
 19 the party who asked for summary judgment is entitled to judgment as
 20 a matter of law, which will end your case. When a party you are
 21 suing makes a motion for summary judgment that is properly
 22 supported by declarations (or other sworn testimony), you cannot
 23 simply rely on what your complaint says. Instead, you must set out
 24 specific facts in declarations, depositions, answers to interrogatories,
 25 or authenticated documents, as provided in Rule 56(e), that
 26 contradict the facts shown in the defendants' declarations and
 27 documents and show that there is a genuine issue of material fact for
 28 trial. If you do not submit your own evidence in opposition,
 summary judgment, if appropriate, may be entered against you. If
 summary judgment is granted in favor of defendants, your case will
 be dismissed and there will be no trial.

19 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
 20 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
 21 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
 22 evidence showing triable issues of material fact on every essential element of his claim).
 23 Plaintiff is cautioned that failure to file an opposition to defendants' motion for summary
 24 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and
 25 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
 26 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

27 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
 28 plaintiff's opposition is filed.

1 5. The motion shall be deemed submitted as of the date the reply brief is due.
2 No hearing will be held on the motion unless the Court so orders at a later date.

3 6. All communications by the plaintiff with the Court must be served on
4 defendants, or defendants' counsel once counsel has been designated, by mailing a true
5 copy of the document to defendants or defendants' counsel.

6 7. Discovery may be taken in accordance with the Federal Rules of Civil
7 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
8 Local Rule 16-1 is required before the parties may conduct discovery.

9 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
10 court informed of any change of address and must comply with the Court's orders in a
11 timely fashion. Failure to do so may result in the dismissal of this action for failure to
12 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

13 9. Extensions of time must be filed no later than the deadline sought to be
14 extended and must be accompanied by a showing of good cause.

15 IT IS SO ORDERED.

16
17 DATED: March 28, 2011


JAMES WARE

United States District Chief Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ERIC HENRY SALDIVAR,
Plaintiff,

Case Number: CV10-03809 JW

CERTIFICATE OF SERVICE

v.

MICHAEL SAYRE et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 1, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Eric Henry Saldivar D-39990
Pelican Bay State Prison
D-2/222
P.O. Box 7500
Crescent City, CA 95532

Dated: April 1, 2011

Richard W. Wicking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk